payment of the plaintiff's costs under rule 3 was not accidental but deliberate in order to deprive him of costs for his failure to avail himself of the provisions of Order 22 rules 1 to 3.

I am prepared to concede that the word "claim" in rule 3 does not include or cover a prayer for costs of a suit but I cannot agree with the proposition that the court's discretion to award costs is fettered by the provisions of Order 22 rule 2(3).

In my opinion the court's discretion to award costs under Order 65 rule 1 can only be taken away in respect of a particular proceeding by a specific rule enacted for that purpose and not by any supposed rule, the existence of which is to be inferred by a tortuous process of mental gymnastics.

From the English authorities cited before me, the general rule in regard to costs in proceedings of this nature appears to be that the plaintiff is entitled to costs up to the date of payment in and the defendant the costs after that date. I see no reason in this case to depart from that practice. I order accordingly.

Mr. Sharma further applied for an order that the taxed costs of the defendant should be first paid out of the money in court before payment is made to the plaintiff. I think that the proper order should be that the defendant's costs be set-off against the plaintiff's costs. I order accordingly.

Order accordingly.

Solicitors: *Dharmananda & Co.; N. Sharma.*

OH HIAM & ORS. v. THAM KONG

[O.C.J. (Gill J.) August 18, 1966]

[K.L. — Civil Suit No. 366 of 1958]

Contract — Transfer of land — Common mistake — Power of court to order rectification of agreement and of transfer — Land Code (Cap. 138), s. 42 — Specific Relief (Malay States) Ordinance, 1950, s. 32.*

In this case the parties had entered into a contract for the sale of certain lands at Gombak but by a mistake common to both parties the written agreement and the transfer dealt not only with the lands agreed to be sold but also a piece of land at Setapak. The plaintiffs applied to set aside the transfer of the land at Setapak.

Held: (1) the agreement in this case was not a nullity and the court could in equity order rectification of the agreement;

(2) the rules of equity pertaining to rectification were applicable although the transfer of the land had been registered under the Land Code.

Cases referred to:—

(1) *Couturier* v. *Hastie* (1856), 5 H.L. Cas. 673.

(2) *Cooper* v. *Phibbs* (1867), L.R. 2 H.L. 149.

(3) *Bell* v. *Lever Brothers* [1932] A.C. 161.

(4) *Huddersfield Banking Co. Ltd.* v. *Henry Lister and Son Ltd.* [1895] 2 Ch. 273.

(5) *Lovell and Christmas Ltd.* v. *Wall* (1911), 104 L.T. 85, 88.

(6) *Frederick E. Rose (London) Ltd.* v. *William H. Pim & Co. Ltd.* [1953] 2 Q.B. 450, 461.

(7) *Craddock Brothers Ltd.* v. *Hunt* [1923] 2 Ch. 136.

(8) *Loke Yew* v. *Port Swettenham Rubber Company Ltd.* [1913] A.C. 491.

(9) *Wilkins & Ors.* v. *Kannammal & Anor.* [1951] M.L.J. 99.

(10) *Lim Hong Shin* v. *Leong Fong Yew* (1918), 2 F.M.S.L.R. 187, 188.

CIVIL SUIT.

S. D. K. Peddie for the plaintiffs.

J. H. Yong for the defendant.

Cur. Adv. Vult.

Gill J.: This is an action to set aside a transfer made in 1958 to the defendant by Oh Hiam, the lawful widow and administratrix of the estate of Teoh Teow Guan deceased, of land held under E.M.R. 5339 for Lot 3660 in the Mukim of Setapak, which formed part of the assets of the said estate. The action was commenced by Oh Hiam as first plaintiff with eight other plaintiffs who, as the children of the said deceased, are the other beneficiaries of the estate. As Oh Hiam died before the action came up for trial, the second and seventh plaintiffs, who are the present administrators (*de bonis non*) of the estate, were substituted in her place as first plaintiffs.

The events leading to the transfer were as follows. By an agreement in writing dated the 30th day of September, 1956 Oh Hiam as representative agreed to sell and the defendant agreed to purchase the several pieces of land comprised in and held under E.M.R. 4139, 4140, 5339, 4219, 4079, 5634 and 5633 for Lots 2663, 2664, 3660, 2771, 2562, 1538 and 1537 respectively, in the Mukim of Setapak, Kuala Lumpur at an agreed price of $450 per acre. Under the agreement, pending the execution of a registrable transfer, the vendor was to deposit the title deeds to the land, and the purchaser to deposit $5,000 by way of part payment of the purchase price of the land, with Mr. Y. S. Lee, an advocate and solicitor, at whose office the agreement was prepared and executed. The purchaser was at liberty to enter into possession of the said lands with effect from the 1st day of October, 1956 and to take any profits which may be derived from the produce thereof and/or be liable for any losses, and the vendor undertook within a reasonable time to make the requisite application to the court for leave to sell the said lands to the purchaser or his nominee or nominees.

On 1st August, 1957 Oh Hiam made an application to this court in Originating Summons

* This section corresponds to section 340 of the National Land Code, 1965.

No. 122 of 1957 for leave to transfer the lands mentioned in the agreement, which, in her affidavit in support of the application, she described as "7 pieces of old rubber lands". On 23rd September, 1957 the court made an order granting her application. In pursuance of the court order she conveyed the seven pieces of land to different persons by four separate transfers, all of which were registered on 20th January, 1958. The lands comprised in E.M.R. 5633 and 5339 for Lots 1537 and 3660 respectively were transferred to the defendant, in E.M.R. 4219 for Lot 2771 to Chow Kit Yee (the defendant's wife), in E.M.R. 4076 for Lot 2562 to Chow Wing Hin (defendant's brother-in-law) and in E.M.R. 4139, 4140 and 5634 for Lots 2663, 2664 and 1538 respectively to Cheung May Keow (defendant's mother-in-law).

The land held under E.M.R. 5339 for Lot 3660, which is the subject matter of the dispute in this case, is just under half an acre in area and is situate at the 3rd mile Setapak Road, Kuala Lumpur, whereas the other six pieces of land with a total area of approximately 34 acres are situate at one place at the 11th mile, Gombak on the road from Kuala Lumpur to Bentong. It is common ground that at all material times the land at Setapak had, and still has, a house on it known as 99, Klang Gates Road, Kuala Lumpur and was therefore essentially a residential land, whereas the lands at Gombak were rubber lands which have been described collectively as the rubber land or the rubber estate at Gombak.

The plaintiffs' case is that Oh Hiam as administratrix intended to sell the rubber lands at Gombak, which were the only lands shown to the defendant, that there were no negotiations for the sale of the land at Setapak and that the grant relating to the land at Setapak got included in the agreement in the mistaken belief that it also related to the several pieces of land at Gombak. Oh Hiam, of course, was not there to give evidence at the trial, but four of the plaintiffs (P.W.3, P.W.4, P.W.5 and P.W.6) have given evidence to say that their mother consulted them with regard to the proposed sale and that at no time was any mention made of the land in Setapak as being one of the lands intended to be sold.

Teo Boon See (P.W.4), a daughter of the deceased, has stated in evidence that she was living in the house at 99, Klang Gates Road, Setapak when her mother discussed with her the sale of rubber lands with old rubber trees at Gombak, and that nothing was said about the sale of the house in which she was living. She was not aware that the house in which she was living had been sold until a neighbour named Ang Yeow came to her to collect rent, whereupon she rushed to her brother (P.W.3) to tell him about it. P.W.3 has stated that he first came to know about the transfer of the Setapak property to Tham Kong when his sister showed him the letter of demand for rent (P.4) from Tham Kong's solicitors to Lim Ser, one of the tenants in the house.

Teo Kim Choon (P.W.3) has further testified that after deciding to sell the rubber estate his mother told a friend about it casually. His brother Teo Ah Chye (P.W.6) told him that an option for the sale of the rubber land was given, but he does not personally know to whom it was given. Teo Peng Yong (P.W.5) has said that his mother gave an option to a taxi driver named Lee Kim Seng, but he did not know whether Lee found a buyer or not.

The evidence of Lee Kim Seng (P.W.7) a taxi driver who has stayed at 4½ mile, Gombak Road, Kuala Lumpur for 30 to 40 years, is that he acted as broker for the sale of Oh Hiam's rubber land at the 11th mile, Gombak Road and that no land in Klang Gates Road was included in the sale. At first he found a prospective buyer named Saw Ban Huat, but Saw Ban Huat did not buy because he offered $450 per acre which the owner refused to accept. Then he was introduced to the defendant and one Chow Wing Hing. He took both of them and one of their friends to see the rubber lands, and not the land at 99, Klang Gates Road, Kuala Lumpur. He was present in Y. S. Lee's office when some sort of transfer of the land took place. P.W.5 gave him a commission and the defendant's wife gave him a token commission of $200. Saw Ban Huat (P.W.8), the owner of Chop Kim Huat at 4¼ mile,, Ulu Gombak Road, Kuala Lumpur, has given evidence to say that about 9 years ago P.W.7 brought an option to him and he knew from the option that the land belonged to Yuen Company. The sale price in the option was $500 per acre. He went to see the land with P.W.7, but he did not buy because he offered only $450 per acre. He was not shown a house in Klang Gates Road.

Then there is the evidence of Mr. Y. S. Lee (P.W.1), the advocate and solicitor, in whose office the agreement of sale was prepared and executed, that as far as he can remember, when he received instructions to prepare an agreement for the sale of certain lands belonging to the estate of Teoh Teow Guan deceased from Madam Oh Hiam, who was then the administratrix of the estate and Tham Kong, the intending purchaser, he was told that the lands to be sold were rubber lands. There was no provision in the agreement in respect of vacant possession of any house on the lands mentioned in the agreement. Provision was made about produce from the land, namely, natural rubber, but there was nothing said about income by way of rent from houses. Subsequently he received instructions to apply to the court for leave to sell the lands. Madam Oh

Hiam gave him instructions for the affidavit in support of the application. Nothing was said about the existence of any house on any piece of land when such instructions were given.

The defendant's evidence is that his brother-in-law named Chow Wing Hing told him in 1956 that some lands in Setapak were for sale and took him to the upstairs of the premises of Yuen Company at Batu Road where he saw a woman named Oh Khim and a man called Kim Choon (P.W.3). He had a discussion about the land with Oh Khim, after which he went with Chow Wing Hing, Kim Choon and three others to Gombak Road to see a big piece of hilly land containing damaged rubber trees and then to Klang Gates Road where he was shown a very small piece of land not even half an acre in area, on which there were 20 to 30 rubber trees in their dying stage and a very old house with wooden walls. Having seen the land, he decided to buy it. On the next day he went with Chow Wing Hing to see the owner at his office in Yuen Company at Batu Road. After some bargaining he agreed to buy the land at $450 per acre. Something was mentioned about the land at Klang Gates Road in the course of the discussions, and he said he would buy the land provided this land was included, the reason being that the land at Gombak Road was only worth a little more than $200 per acre. On the following day he went to the office of Mr. Y. S. Lee (P.W.1) where an agreement was signed. After the agreement he had the land at Gombak cleared of grass and replanted with rubber. In 1958 the lands were transferred to him and to three other persons.

His story under cross-examination is that before he bought the lands he insisted that the Klang Gates property should be included, and he did check to make sure that the title to that property was included in the agreement. As he did not have enough money, three of the titles were transferred to his mother-in-law named Cheung May Keow. His wife and Chong Wing Hing also provided some money. He cannot remember whether he told Mr. Lee that it was important that the Klang Gates property should be included in the agreement. He got possession on 1st October, 1956, but he took no steps to take possession of the Klang Gates property as he left it to his wife who told him that she was going to collect rent from people living on the land. Changes were made to the Klang Gates property since 1956 when it came under the care and managment of his wife, but he went to the land only once shortly after he had purchased it. He had no idea whether the land was within the municipal area, but there were neighbouring houses. More houses started going up when a co-operative society started commencing work opposite the land in 1957. He knew nothing about assessment on this property and it was for his wife to answer why rent was asked for from February 1958. In conclusion he denied that he was never given the opportunity of purchasing the Klang Gates Road property and that it was transferred to him as a result of a mistake.

Chow Wing Hing (D.W.3) has given evidence on behalf of the defendant to say that as a hawker of Chinese sauce he came to know Oh Hiam who in 1956 told him that she wanted to sell her land. At his request she gave him an option for the sale of six pieces of land at Gombak and one piece at Setapak. At first he found a prospective buyer named Ah Khow. He took Ah Khow to Kim Choon (P.W.3) who took him and Ah Khow to see six pieces of land at Gombak and another piece of land at the 3rd mile, Setapak Road, Kuala Lumpur, on which there were several rubber trees and an old house which was about to fall down. Ah Khow, however, did not buy the land. He then looked for other buyers after getting another option from Kim Choon. This time he found a prospective buyer named Tham Kong, the defendant, a relative of his whom he had known for a very long time. He took the defendant and four other persons to see Kim Choon in the latter's house at Yuen Company's premises. He and the defendant saw Oh Hiam. Kim Choon then took them all to see the land. At first they saw the six pieces of land at Gombak and on their way back went to see the land at Setapak. On the following day he and the defendant saw Kim Choon and Oh Hiam. After some discussions the defendant offered to buy the lands. Subsequently he went to a lawyer's office.

Under cross-examination the witness said that he was selling Chinese sauce in 1956 and he had bought sauce from Thye Hoe Sauce Factory in Gombak. He acted as a broker in this transaction and was paid a commission of $400 by the defendant. He also bought one of the pieces of land because the defendant did not have enough funds to buy all the lands. At the time of sale a discussion took place about possession of the lands, and it was agreed that possession was to be given in October, 1956. The Klang Gates property was included when the question of possession was discussed.

Chow Kit Yee (D.W.4), the defendant's wife, has given evidence to say that she was taken to see the lands which her husband agreed to buy. Chow Wing Hing (D.W.3) was the broker. At first she saw a larger piece of land at Gombak and later a smaller piece at Setapak. There were 17 trees on the land at Setapak, and she had them cut down at a cost of $3,000 as she was to be in charge of this land after the agreement was signed. There was a big house on the land with people living in it and she collected rent from them, but Teo Boon See (P.W.4) was

not living there in 1957. She spent large sums of money on improving the land, but she kept no accounts and had no receipts for the amount she spent. Before the agreement she had gone and seen other lands at Gombak opposite to the lands which were subsequently purchased by her husband. The selling price of these other lands was $210 per acre. The land was 104 acres in area, but she did not buy because the rubber trees on the land were too old.

Evidence was also produced on behalf of the defendant that a piece of land at 10¾ mile, Gombak Road, which was 104 acres in area, was sold for $22,000 in November 1956.

As I have already stated, the evidence for the plaintiffs is that the defendant was shown only the rubber lands at Gombak. The evidence on behalf of the defendant, on the other hand, is that the land at Setapak was also shown to him and that the agreement was entered into on the express understanding that this land was also to be included. Each side has produced evidence as to who the broker in relation to the transaction was. The evidence of P.W.3 is that his brother Teo Ah Chye (P.W.6) told him about an option. P.W.5 has given evidence to say that an option was given by his mother to a taxi driver named Lee Kim Seng. Lee Kim Seng has said that he had the option from P.W.5. Chow Wing Hing (P.W.3), the other alleged broker, says that he got two options from Kim Choon (P.W.3) who also showed the lands to him and the defendant. All this is denied by P.W.3. Both brokers claim to have known Oh Hiam. Lee says that he knew her because he had taken his car to her shop for repairs. Chow claims that he came to know her because he used to sell things to her. Chow is in fact related to the defendant and he ultimately bought one of the lands which were agreed to be sold.

I have considered the evidence of the two brokers very carefully and have come to the conclusion that, notwithstanding some apparent discrepancies in the evidence, Lee Kim Seng was the only broker in this case, because he struck me as being a more truthful witness than Chow Wing Hing. Moreover, he is an independent witness and his evidence is corroborated by the evidence of Saw Ban Huat (P.W.8), another independent witness. Chow Wing Hing, on the other hand, is very much an interested party as he bought one of the rubber lands. I accept Lee's evidence that he got information from a man who had travelled in his taxi that Oh Hiam wanted to sell her rubber lands, that he went to see her and got an option and that an employee working in Thye Hoe Sauce Factory at Gombak Road, where Chow Wing Hing was in the habit of buying sauce, introduced Chow Wing Hing and the defendant to him. I also accept his story that he showed the defendant and Chow Wing Hing only the rubber lands at Gombak. This part of his evidence, to some extent, is borne out by the evidence of Mr. Y. S. Lee (P.W.1), yet another independent witness, and by the agreement itself in which the title to the Setapak land was shown as No. 3 in the list and not as the first or the last to distinguish it from the titles relating to the rubber lands at Gombak. Moreover, Oh Hiam in her affidavit in support of her application for a court order spoke of "7 pieces of old rubber lands".

Taking the evidence as a whole, I am satisfied that during the course of negotiations between the parties there was no mention made about the land at Setapak. The negotiations were in respect of a rubber estate at the 11th mile, Gombak Road. There were six different titles to contiguous lands which the plaintiffs have described as the rubber estate belonging to the estate. The seventh title was handed along with the other titles to Mr. Lee at the time of the preparation of the agreement in the mistaken belief that it also related to a piece of land which formed part of the rubber estate. It was for this reason that no provision was made in the agreement in respect of vacant possession of any house on the lands mentioned in the agreement. As Mr. Lee has stated in evidence, as far as he can remember, the lands to be sold were rubber lands.

Under the agreement the defendant was to have possession of the lands on the date of the agreement. It is quite clear from the evidence that he took possession of the rubber lands at Gombak and had them cleared and replanted, but he took no steps to assert his right to the land at Setapak for the obvious reason that he had no knowledge that he had acquired any such right. When questioned as to why he took no steps to bring the land at Setapak under his control, he explained it away by saying that he left it to his wife. I do not accept the wife's evidence about her collecting rents from various people who were living on the land. I consider her story that she spent $3,000 to have 17 trees on the land cut down as fantastic. In my opinion there is very little truth in all her evidence. If she was to look after the Setapak land, why was it not transferred to her?

The defendant has said that the Setapak land was worth $7,000 in 1956. P.W.3, on the other hand, says that the land was worth $40,000. In any event, the defendant obtained the Setapak land and land held under E.M.R. 5633 for Lot 1537 (which is nearly 8 acres in area) for a mere $3,786. No independent evidence as to the valuation of the Setapak land was produced, but I am satisfied that there was no intention to include this land in the rest of the lands merely because the other lands were not worth $450 per acre. Evidence has been produced about the

sale of 104 acres of land in the neighbourhood of the land at Gombak Road for a little over $200 per acre, but there is no evidence as to what sort of land that was. In the first place the stamp office thought that the land was undervalued and charged stamp duty on the basis that it was worth $25,000. In the second place, assuming that it was a rubber land, there is no evidence as to whether the whole area was planted with rubber.

The truth is that it was only after the transfers were executed in January 1958 that the defendant came to know that he had obtained a transfer in respect of this piece of land at Setapak. It was nearly six months after this transfer that he took any steps to assert his right to the land by asking his solicitors to send the letter dated 3rd June, 1958 (P.4) to Lim Ser demanding that all rents as from February 1958 be paid to him. The plaintiffs themselves did not know that the title to this property had got included in the agreement until some one went to collect rent from Teo Boon See (P.W.4). In my opinion the evidence in this case for the conclusion that neither side knew about the inclusion of the property at Setapak in the agreement until after the transfers is overwhelming. The title to this property was included in the agreement in the mistaken belief on the part of Oh Hiam and the defendant that it was a title to one of the lands which collectively formed the rubber estate at the 11th mile, Gombak Road. I have therefore arrived at the conclusion that it was neither the intention of Oh Hiam to sell nor the intention of the defendant to purchase the land at Setapak; it seems to me as clear a case of common mistake as could occur.

The legal position with regard to cases where agreement has been reached, but upon the basis of a common mistake, is discussed by *Cheshire and Fifoot* on the Law of Contract, 6th Edition, at pages 189 to 202. At page 198 the conclusion stated is that

> "at common law a contract is not void merely because the parties have made the same mistake, however fundamental; . . . . A contract will be void only if there is nothing to contract about, either because the subject-matter does not exist at the time of the agreement or because the object of a purported sale already belongs to the buyer; . . . ."

In other words, a mistake common to both parties renders the contract void only if it is a mistake as to the existence of a state of facts forming the basis or foundation of the contract and not merely collateral to it. Thus, where *A* agrees to sell to *B* a cargo of corn on its way to England which (unknown to both) has been previously sold because it was affected by heat on the voyage, the contract will be void: *Couturier* v. *Hastie.*[1] Similarly, the contract will be void where *A* contracts to lease to *B* property which (unknown to both of them) actually belongs to *B*: *Cooper* v. *Phibbs.*[2]

A common error as to some incident of the contract, which is not basic but collateral, will not affect its validity. This is illustrated by the case of *Bell* v. *Lever Brothers, Ltd.*[3]. In that case Lever Brothers, who had a controlling interest in the Niger Company, appointed Bell managing director of the latter company for five years at an annual salary of £8,000. After three years the services of Bell became redundant owing to the amalgamation of the Niger Company with a third company, and Lever Brothers agreed to pay him £30,000 as compensation for the loss of his employment. After they had paid this money, they discovered for the first time that Bell had committed several breaches of duty during his directorship which would have justified his dismissal without compensation. They therefore sued for the recovery of £30,000 on the ground *inter alia* of common mistake. It was held that the company could not recover, as the mutual mistake of the parties did not destroy the identity of the subject-matter, but related only to a quality that was not material.

It is to be observed that the agreement terminating Bell's contract of service was made by the company in ignorance of the fact that he had been guilty of a breach of duty which would have entitled them to terminate the service contract summarily. Bell, also, gave no thought to the breach at the time the cancellation agreement was entered into. Consequently, there was a mutual mistake as to the true facts, but, although the company could have determined the service contract summarily, and would not have entered into the cancellation agreement if it had not been for that mistake, the fact remained that Bell's contract of service was actually still in existence, and, consequently, the company, in return for its £30,000, obtained what it had bargained for, *viz.*, the cancellation of that contract. The service contract, which was the basis of the cancellation agreement, had been unaffected, and the mutual mistake related merely to a quality which was immaterial, *viz.*, that that contract might, in certain circumstances, have been summarily determined.

The fact that a contract founded on common mistake is not a complete nullity does not necessarily mean that English law refuses all relief to the parties. Equity, in the exercise of its concurrent jurisdiction, interferes in two respects. First, it will, if it thinks fit, set the contract aside for mistake, whether of a fundamental character or not. Secondly, it rectifies a written contract or deed that does not accurately record the agreement made by the parties. (See *Cheshire and Fifoot,* 6th Edition, page 198.)

A court of equity will intervene where common law fears to tread and, upon proof that

the parties have contracted under a common and material mistake, it may grant relief upon such terms as it thinks proper. The case in point is *Huddersfield Banking Co., Ltd.* v. *Henry Lister & Son, Ltd.*[4] in which the facts were as follows. In 1889 Lister had mortgaged his mills and the fixtures therein to a bank. In 1890 he converted himself into a limited company which in 1892 went into liquidation. The bank, as mortgagees, claimed to be entitled as against the liquidator to 35 looms in the mills. The question was whether they were fixtures within the terms of the mortgage deed. The agents of the bank and of the liquidator inspected the premises and agreed that the looms were not attached to the mills and were therefore not fixtures; and, on that assumption, they concurred in an order made by the court for their sale by the liquidator. It later appeared that the looms were affixed to the mills at the time when the mortgage was made, and had subsequently been wrongly separated by some unauthorized person. The bank now applied to the court to set aside the order on the ground that it represented an agreement based on a common mistake, and the court did set it aside. Kay L.J. said (at page 284):

"It seems to me that, both on principle and on authority, when once the court finds that an agreement has been come to between parties who were under a common mistake of a material fact. the court may set it aside, and the court has ample jurisdiction to set aside the order founded upon that agreement. Of course, if . . . . third parties' interests had intervened and so on, difficulties might arise; but nothing of that kind occurs here."

As regards rectification of written agreements Cozens Hardy M.R. stated in *Lovell and Christmas Ltd.* v. *Wall*[5]:—

"The essence of rectification is to bring the document which was expressed and intended to be in pursuance of a prior agreement into harmony with that prior agreement. It presupposes a prior contract and it requires proof that by common mistake the final completed instrument as executed fails to give proper effect to the prior contract. For this purpose evidence of what took place prior to the execution of the completed document is obviously admissible and indeed essential."

In *Frederick E. Rose (London), Ltd.* v. *William H. Pim & Co., Ltd.*[6] Denning L.J. said:—

"In order to get rectification it is necessary to show that the parties were in complete agreement upon the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, one does not look into the inner minds of the parties — into their intentions — any more than one does in the formation of any other contract. One looks at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compares it with the document which they have signed. If one can predicate with certainty what the contract was and that it is, by a common mistake wrongly expressed in the document, then one rectifies the document; but nothing less will suffice."

Cheshire and Fifoot, 6th Edition, at page 200 states as follows:—

"Equity, in the exercise of its exclusive jurisdiction, has satisfactorily dealt with cases where, though the consent is undoubted and real, it has by mistake been inaccurately expressed in a later instrument. Suppose that *A.* orally agrees to sell a house, exclusive of its adjoining yard, to *B.* Owing to a mistake the later formal and written instrument includes the yard as part of the property to be sold, and, what is worse, the subsequent conveyance actually conveys the yard to *B.* Can *A.* have the written agreement and the deed rectified, or will he be successfully met by the plea that what has been written and signed must stand?

It may be answered at once that in cases of this type, where it is proved that owing to a mistake the written contract does not substantially represent the real intention of the parties the court has jurisdiction, not only to rectify the written agreement, but also to order specific performance of it as rectified."

In *Craddock Brothers, Ltd.* v. *Hunt*[7] where owing to a mutual mistake in reducing a verbal agreement for the sale of land into writing, the written agreement failed to express the real bargain between the parties, and the mistake was embodied in a deed of conveyance, with the result that a piece of land, which had in fact been bought and paid for by the plaintiffs, was wrongly conveyed by the vendors to the defendant, who had notice of the plaintiffs' title, it was held that the court since the Judicature Act, 1873, had jurisdiction to rectify the conveyance, notwithstanding that the deed conformed strictly with the written agreement, and although the effect of ordering rectification was to grant specific performance of a written agreement with a parol variation. It was also held that the defendant was a trustee of the legal estate for the plaintiffs, and must be ordered to convey it to them. Warrington L.J. said (at page 159):—

"The jurisdiction of courts of equity in this respect is to bring the written document executed in pursuance of an antecedent agreement into conformity with that agreement. The conditions to its exercise are that there must be an antecedent contract and the common intention of embodying or giving effect to the whole of that contract by the writing, and there must be clear evidence that the document by common mistake failed to embody such contract and either contained provisions not agreed upon or omitted something that was agreed upon, or otherwise departed from its terms. If these conditions are fulfilled then it seems to me on principle that the instrument so rectified should have the same force as if the mistake had not been made, in which case the Statute of Frauds would be no defence to an action founded upon it."

It is clear from the authorities that, although the agreement in the present case is not a nullity, the courts in England would order rectification of such an agreement, provided the following conditions are satisfied: (a) there must be an actually concluded contract antecedent to the instrument to be rectified, as the court will not make a new agreement for the parties; (b) there must be clear evidence of the real intention; (c) there must be a mistake common to both parties, and it must have existed at the time of the execution of the instrument; (d) the mistake must be exactly proved, i.e., the plaintiff must show

the precise form in which the instrument ought to be drawn up; and (e) the mistake must be one of expression only. A written contract or a deed may be rectified even if the parties can no longer be restored to the position occupied when the contract was made, and even though the mistake has been embodied in a deed of conveyance. Extrinsic and even parol evidence will be admitted to ascertain the true intent of the parties, notwithstanding that the contract is one which is required to be under seal or one which the Statute of Frauds requires to be evidenced by writing.

The question, however, is whether the rules of equity pertaining to rectification apply to lands registered under the local land law, in view of the provision in section 42 of the F.M.S. Land Code (now section 340 of the National Land Code) that the title of a registered proprietor of any land shall be indefeasible except in any case of fraud or misrepresentation to which such registered proprietor was a party or privy. There is ample authority for the proposition that they do apply. In *Loke Yew* v. *Port Swettenham Rubber Company, Limited* [8] it was held by the Privy Council that, apart from the exception in section 7 of the Registration of Titles Regulation, 1891 (the terms of which were similar to section 42 of the F.M.S. Land Code or section 340 of the National Land Code), as the rights of third parties did not intervene, the respondents could not better their position by obtaining registration under circumstances which made it not honest to do so, and that it was the duty of the court to order rectification. In *Wilkins and Others* v. *Kannammal and Anor.*[9] it was held by the Court of Appeal that the *Torrens Law* is a system of conveyance; it does not abrogate the rules of equity; it alters the application of particular rules of equity but only so far as necessary to achieve its own special objects.

In *Lim Hong Shin* v. *Leong Fong Yew*,[10] Edmonds J.C. said:

"The general principle applicable in cases of rectification on account of mistake is set out in section 31 of the Specific Relief Enactment (since replaced by section 30 of the Specific Relief (Malay States) Ordinance, 1950). The mistake must be common to all parties, and there must be very clear evidence of the real intention. When these conditions exist the court may rectify the instrument so as to express the real intention so far as this can be done without prejudice to rights acquired by third parties in good faith and for value. These principles are applicable to instruments or registers relating to all land, whether it be held under Part III of the Land Enactment or the Registration of Titles Enactment; sections 74 and 75 of the latter Enactment provide for rectification of mistake. In this respect, in my opinion, there is no reason to distinguish the two Enactments."

Section 32 of the Specific Relief (Malay States) Ordinance, 1950 states:

"In rectifying a written instrument, the court may enquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the enquiry what the language of the instrument was intended to be."

For the reasons I have stated I am satisfied that it is open to this court to order notional rectification of the agreement in this case and the transfer executed in pursuance of that agreement by ordering the defendant to re-transfer the land held under E.M.R. 5339 for Lot 3660 in the Mukim of Setapak on repayment of the purchase price, the expenses in connection with the original transfer and any money which he has spent on improving the land. In my opinion, the defendant has spent no money on improving the land. As I have already stated, I reject his wife's evidence that she spent large sums of money to have the trees on the land cut down and for improving the land. She has stated in her evidence that she did not go back to the land after 1958 because she was told that if she did, she would be stabbed to death. The purchase price of the land at $450 per acre was less than $225. I would add to that a sum of $25 as the amount which might have been spent in connection with having the transfer stamped and registered. The order will therefore be that on payment of a sum of $250 by the plaintiffs into court the defendant do execute a registrable transfer in favour of the 2nd and the 7th plaintiffs, Teo Kim Choon and Teo Boon See (f), as representatives and that, in the event of his failure to do so within a month after the money has been paid into court, the senior assistant registrar of this court do execute such registrable transfer on behalf of the defendant. The defendant will have to pay the costs of the action.

Order accordingly.

Solicitors: *Skrine & Co.; Dato' S. M. Yong & Co.*

SIM YAN HOO v. MATU AND DARO DISTRICT COUNCIL

[O.C.J. (Lee Hun Hoe J.) August 19, 1966]

[Sibu — Civil Application No. 1 of 1966]

Administrative Law — Certiorari — Amendment of licence by District Council — Ultra vires power of District Council — No opportunity given to licensee to be heard.

In this case the Matu and Daro District Council had purported to vary the terms of a boat hawker's licence issued to the applicant. Complaints had been received against the applicant and the council directed that he should not be permitted to trade in certain kampongs. No opportunity was given to the applicant to be heard before the decision was made.

Held: the applicant had shown that the District Council had acted *ultra vires* and had infringed the rules of natural justice and therefore the order for *certiorari* should be granted.

Cases referred to:—

(1) *Maradana Mosque Trustees* v. *Mahmud* [1966] 2 W.L.R. 921 at p. 928.